1967

Mary v. Larsen and Mary Kaye and Sandra Lee Larsen, Minors, By Their Guardian Ad Litem, Mary v. Larsen, and Intermountain Service, Inc., A Utah Corporation v. Clover D. Christensen and Vernon L. Stevenson : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY V. LARSEN and MARY KAYE and SANDRA LEE LARSEN, minors by their Guardian Ad Litem, MARY V. LARSEN, and INTERMOUNTAIN SERVICE, INC., a Utah corporation,
Plaintiffs and Appellants,

vs.

CLOVER D. CHRISTENSEN and VERNON L. STEVENSON,
Defendants and Respondents.

Case No. 10,833

BRIEF OF RESPONDENTS

Appeal from the District Court of
Salt Lake County, Utah
Honorable Leonard W. Elton, Judge

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CASES CITED

OTHER AUTHORITIES

IN THE SUPREME COURT
of the
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STATEMENT OF THE KIND OF CASE

This is an action by plaintiffs and appellants against defendant and respondent Dr. Vernon L. Stevenson and also against the defendant Clover D. Christensen to recover damages for the death of plaintiffs' decedent, Kurt E. Larsen, as a result of an automobile motorcycle collision.

DISPOSITION IN LOWER COURT

At the time of the pre-trial the Honorable Leonard W. Elton dismissed the defendant Dr. Vernon L. Stevenson from this action by granting his Motion For Summary Judgment on the grounds that there was no genuine issue of material fact as to

the existence of a principal-agent- relationship between the defendant Dr. Vernon L. Stevenson and the defendant Clover D. Christensen.

RELIEF SOUGHT

Respondent seeks to have the granting of his Motion For Summary Judgment by the pre-trial court affirmed.

STATEMENT OF FACTS

On the 13th day of February, 1963 at the intersection of First South Street and Tenth East Street, Salt Lake City, Utah a collision occurred between an automobile owned by the respondent Dr. Vernon L. Stevenson and driven by the defendant Clover D. Christensen and a motorcycle operated by the deceased, Kurt E. Larsen. At the time of said collision the deceased, Kurt E. Larsen, was operating a motorcycle pursuant to his duties as a funeral escort, and he subsequently died as a result of the injuries received in said collision.

The defendant Clover D. Christensen was operating the respondent's automobile pursuant to his employment as a service station operator. The uncontroverted facts of that relationship are as follows:

In approximately September, 1962 the defendant Clover D. Christensen began operating a service station under a lease from Phillips Petroleum Company at 860 Third Avenue in Salt Lake City, Utah. At about that time the respondent Dr. Vernon L.

Stevenson began patronizing the defendant's station for gasoline and other maintenance services, which patronage continued until approximately August, 1963 (Christensen Dep. p. 11). During that period of time the Stevenson automobile was washed on the average of once a week and was serviced twice a month by the defendant Clover D. Christensen. The usual practice was for Dr. Stevenson to notify the defendant Christensen that he wanted the car serviced and Christensen would go to the doctor's place of business, which was about three blocks south of the service station, and from there he would drive the Stevenson automobile back to the station where he would service it after which he would return it to the doctor's office (Christensen Dep. 14). There were occasions when Dr. Stevenson would leave the automobile at the service station and walk to the office. On at least one occasion the Stevenson automobile was delivered to Dr. Stevenson at his home rather than to his office (Christensen Dep. 33). At no time was any additional charge made by the defendant Christensen for the service of picking up and delivering the Stevenson automobile. The ordinary practice was that once the Stevenson car was in his possession Christensen would take over the maintenance and care of the car without specific direction from Dr. Stevenson, except that when mechanical repairs were needed he would first inform Dr. Stevenson about the need for such repairs and then would go ahead and complete them if so directed (Christen-

sen Dep. p. 45). Dr. Stevenson did not instruct Christensen how to carry out the repairs. He would simply advise him what needed to be fixed and then leave it to Christensen to accomplish that end (Christensen Dep. 45). Prior to the date of the accident Christensen had advised Dr. Stevenson to have the tie rods replaced and also to have the tires balanced, which tires Christensen had recently sold him (Christensen Dep. pp. 18-19). On the day of the accident Dr. Stevenson came to the station and requested that Christensen replace the tie rods, wash the car, fill it with gas and balance the wheels (Christensen Dep. 18), which work was customarily done by Christensen's station (Christensen Dep. pp. 19-20). Christensen agreed at that time to pick the car up at Dr. Stevenson's parking lot and return it to the station to complete the servicing.

About one hour later Christensen went to the parking lot, drove Dr. Stevenson's car back to the service station and completed all the servicing except for the balancing of the wheels (Christensen Dep. p. 46). Christensen discovered that his bubble wheel balancer was not working effectively. Since Dr. Stevenson was a good customer and he wanted to do a good job for him, he decided to take it to the Phillips Training Station where the wheels could be balanced on a reliable machine (Christensen Dep. pp. 21-22). At approximately 4:30 P.M. Christensen left the service station driving the Stevenson vehicle, his destination being the Phillips Training

Station. His only purpose for the trip was to balance the wheels of the Stevenson automobile (Christensen Dep. pp. 23, 40). While so driving Dr. Stevenson's automobile the defendant Christensen was involved in the collision with the deceased, Kurt E. Larsen, at the intersection of First South Street and Tenth East Street. At no time prior to the accident had Christensen informed Dr. Stevenson of the fact that he was unable to perform the wheel-balancing procedure at his service station; and at no time prior to the accident did he inform Dr. Stevenson that he was taking the car to another service station or garage to complete that procedure (Christensen Dep. pp. 21-22, 9, 49). Christensen intended to get the wheels balanced at the Phillips Training Station, pay the Phillips Training Station for that service and then charge that amount to Dr. Stevenson's credit card, as was the routine method of paying for Christensen's services. After the accident occurred Christensen notified Dr. Stevenson of the accident and assured hm that he would get the automobile fixed (Christensen Dep. 8).

After consideration of these facts the pre-trial court concluded that the accident occurred while the vehicle was under the control of an independent contractor, and that there was not a genuine issue of material fact as to the existence of an agency relationship between Dr. Stevenson and the defendant Christensen at the time of the accident, and thus granted the respondent's Motion For Summary Judgment.

ARGUMENT

THE PRE-TRIAL COURT WAS CORRECT IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT INASMUCH AS THE UNCONTROVERTED FACTS SHOWED A RELATIONSHIP OF INDEPENDENT CONTRACTOR AND NO GENUINE ISSUE OF MATERIAL FACT AS TO THE EXISTENCE OF AN AGENCY RELATIONSHIP BETWEEN THE RESPONDENT AND THE DEFENDANT CHRISTENSEN.

In granting the defendant Dr. Vernon L. Stevenson's Motion For Summary Judgment the pre-trial court stated:

> ". . . It appearing that the undisputed facts as shown by the deposition of the defendant Christensen which was published, show that Christensen's status was that of a bailee-independent contractor over whom the defendant Stevenson exercised no supervision or control in the manner in which Christensen serviced said vehicle. The accident having occurred while Christensen was driving the car to another establishment for the purpose of completing repairs, and the negligence, if any, of Christensen is not imputable to Stevenson; . . ." (Order Granting Summary Judgment)

Thus the court, after considering Christensen's deposition and Stevenson's affidavit, which constituted all of the evidence which could be presented upon the relationship existing between Dr. Stevenson and Clover D. Christensen, concluded that as a matter of law the relationship of bailee-independent contractor was established.

Respondent does not quarrel with the proposition stated by the appellant that the granting of a Summary Judgment is a severe measure for the court to invoke; however, the procedure does exist for the specific purpose set forth in the case of *Richards v. Anderson*, 9 Utah (2d) 17, 337 Pac. (2d) 59 (1959):

> ". . . Yet it does have the salutary purpose of not requiring the time, trouble and expense of trial, when the best showing the plaintiff could make would not entitle him to recover under the law."

It is respondent's position in this appeal that all of the evidence as to the relationship between the defendant Clover D. Christensen and the respondent Dr. Vernon L. Stevenson was before the court, and that such facts presented no evidence of an agency relationship. The appellants in their Brief would have us believe that the "any evidence" rule stated in the *Adamson v. United Mines Workers* case, 3 Utah (2d) 37, 177 Pac. (2d) 972 (1954) would prevent the granting of a Summary Judgment where even an inference may be found from the evidence against the prevailing party. However, that case itself points out the correct boundaries of the "any evidence" rule. On page 41 of that decision the court states:

> "We believe that before the lower court could properly submit the question of agency to the jury, the burden was upon plaintiff to present facts and evidence which would sus-

> tain a verdict, and the evidence must do more than raise a conjecture or surmise that the ultimate fact is as alleged . . ."

Respondent believes that the evidence as developed showed clearly an independent contractor relationship and that any inference of agency would be nothing more than conjecture or surmise of that fact.

It has been established for many years in the jurisprudence of Utah that the essential element in a principal-agent relationship is the principal's right of control over the agent. *Fox v. Lavender*, 89 Utah 115, 56 Pac. (2d) 1049. Plaintiffs, however, on page 7 of their Brief concede that there was no control by Stevenson over Christensen's repair and maintenance of the car, and that as to such work Christensen was clearly an independent contractor. Thus, we need not here belabor the point that when Christensen gained possession of Stevenson's car for the purpose of repairing it he was at that time an independent contractor providing a service, the accomplishment of which was not controlled by the respondent, Dr. Vernon L. Stevenson.

Since the appellants conceded that an independent contractor relationship existed as to the repair and maintenance of the car, it remains only to be decided whether or not the plaintiffs were able to establish from the facts any competent evidence of the independent contractor relationship terminating and a principal-agent relationship arising. An anal-

ysis of the facts and of the applicable law shows beyond a doubt that the pre-trial court correctly found that the bailee-independent contractor relationship existed at the time of the accident, and thus any negligence on Christensen's part was not imputable to Dr. Stevenson.

It should first be pointed out that there is no Utah authority directly on this question. The case of *Johnson v. Hardman*, 6 Utah (2d) 421, 315 Pac. (2d) 853 (1957), quoted by the appellants, is not in point as that case did not concern itself with an independent contractor relationship as we have in the present case. In *Hardman* the question was whether or not an agency relationship had been created between a potential vendor and vendee, a factual situation much different from the present case.

The case of *Morley v. Rodberg*, 7 Utah (2d) 299, 323 Pac. (2d) 717 (1958) is also of little help since it involves a fact situation where the owner of a car was riding in the car at the time of the accident, and the court was concerned with the presumption that the driver was presumed to be the agent of the owner where the owner is present in the car at the time of the alleged negligence. The presence of Dr. Stevenson within the car in the case at bar would obviously have created a jury question as to agency; however, he was not present. The *Rodberg* case is, however, helpful in this respect — it affirms the finding of the lower court that the garageman was

an independent contractor even where the owner was present and the presumption applied. In the present case there is no such presumption; and there is no factual issue involved since the owner was not present.

There must be a distinction drawn between the usual agency case and the present situation, because under the facts here an independent contractor relationship was established for the repair and maintenance of the car, a point conceded by appellants. Therefore, the question is whether there is evidence of any alteration of that relationship. The general rule in that regard is stated in 35 *A.L.R.* (2d) *at page* 805:

> "In the great majority of cases involving negligent operation of a car by service personnel in connection with the work for which it has been placed in their custody, the Court has held that the owner is not liable."
>
> "This result is generally reached on the theory that the service establishment becomes the bailee of the car as an independent contractor, since the owner is concerned only with the results of the work and not with the detailed manner in which it is carried out."

An examination of some of the cases thus referred to will show that as a practical matter where the car is delivered to the garage for servicing a presumption arises that a baliee-independent contractor relationship is initiated and that the owner is not liable as a matter of law unless a change in that relation is proved.

In the case of *Nawrocki v. Cole*, 249 Pac. (2d) 969, Washington (1952), the owner of the car had experienced mechanical difficulties and had pulled into a service station and requested the service station operator to check the car, which the operator did in a few minutes and then presented a bill for his services. The owner requested that the mechanic take it out on the highway and test it to be sure that it was operating properly. The mechanic, accompanied by one of the owner's guests, was involved in a collision while test driving the car. In the trial of the action the jury found that there was agency between the operator of the automobile and the owner. On appeal, the supreme court of Washington reversed and held as a matter of law that the garage operator was an independent contractor and his negligence, if any, could not be imputed to the owner. The court said, in viewing the evidence in favor of the plaintiff, that it nevertheless showed:

> "The evidence, so considered, establishes that the mechanic was engaged in an independent business, that of repairing automobiles. He undertook a specified piece of work, the repair of defendant's car. Defendant did not know what had to be done, and the mechanic was free from his direction and control regarding the details or manner of repair. Defendant was concerned only with the result of the work and did not supervise it, except to request that the car be tested to determine whether the work of repair was completed. Neither defendant nor his guest, who rode

with the mechanic during the test, specified and controlled the exact place or kind of test to be made. The test became part of the work of repair, and the mechanic did what he determined from the test was necessary to finish the job. Not until then did he complete his work, deliver the car to defendant, and receive his pay. . . .

"*Upon these facts the mechanic became an independent contractor, as a matter of law, when he accepted defendant's car for repair. Defendant's request that the car be tested would not change this relationship, as plaintiff contends, and it prevailed until the car was re-delivered to defendant.* (Emphasis ours)

"This is true, even if we assume that consideration should be given to any presumption or inference of fact, arising out of defendant's ownership of the car, that the mechanic was an agent of the defendant. The evidence introduced by defendant on this issue being uncontradicted, unimpeached, clear, and convincing, and not being met by any evidence of plaintiff to the contrary, the presumption cannot make a case for the plaintiff on this theory." (Supra, pp. 970-971)

In the case of *Councell v. Douglas*, 126 N.E. (2d) 597, Ohio (1955) the owner had taken his car into the service station to be serviced and washed. He requested that someone ride home with him and return the car to the station for the accomplishment of the work. While returning the car to the station the attendant was involved in an accident. Upon

trial of the case the owner was held liable; however, on appeal the supreme court of Ohio found as a matter of law that the owner was not responsible for the negligence of the service station attendant. The court said:

> "There is nothing in the evidence tending to prove that in riding home with the defendant and the driving of his car back to the service station were not done merely as incidence to rendering this service to his automobile and as part of the result for which defendant had contracted. There certainly could have been no occasion for defendant to request anyone to ride back with him and drive his car back if he had not wanted the service station to render the service on his automobile for which he had contracted." (Supra, p. 601)

And in the case of *Ford v. Fox*, 73 A. (2d) 270, New Jersey (1950) one Fox took his car to Flannagan's service station to have it inspected. Flannagan advised him that he would have to have a window installed before it could pass inspection and that he would have to have it put in by some other businessman. Fox instructed Flannagan to take care of what needed to be done to get it inspected. The next day Flannagan's employee, DeYoung, drove the car to Candon to have it repaired and inspected. However, he was unable to have the window installed due to mechanical difficulties with the door, and thus he could not get it inspected. As he was returning to the garage he was involved in a collision with the

plaintiff. At the pre-trial the parties agreed that the automobile had been delivered to Flannagan for the purpose of making repairs and adjustments thereto, and that at the time of the accident the automobile had not yet been returned to its owner, and that DeYoung had taken the automobile from the place of business of Flannagan for the purpose of having it inspected. At the end of the testimony Fox moved for a directed verdict on the ground that there was no agency established. The motion was denied and on appeal the appellate court reversed, holding as a matter of law that the directed verdict should have been granted. In doing so the court said:

> "In the instant matter the facts and reasonable inferences therefrom are, in all material respects, not in dispute. We consider that they compelled a direction of judgment in favor of Fox on the ground that the car was not being operated by his agent or servant at the time of the accident. Fox was concerned with the end result, namely, having his car inspected. He was not concerned with the means employed but left those, including the requisite repairs, to Flannagan. His arrangements with Flannagan contemplated no retention of control by him from the time of his delivery of the car until its return to him inspected. He had no control over the driver DeYoung, or over his route or manner of driving. Flannagan's undertaking to have the window installed and the car inspected was incidental to his business and DeYoung, at the time of the accident, was driving the car

on his behalf as his agent or servant. Although it may be said that DeYoung was operating the car with Fox's permission or acquiescence he was not his agent or servant within the sight of authorities. While in some states statutes have been enacted imposing liability upon the owner for injuries resulting from the negligent operation of his car upon a showing without more, that his car was being operated with his express or implied consent, the New Jersey legislature has not taken similar action." (Supra, p. 72)

These cases illustrate the approach taken by the great majority of cases in the owner-service station situation. In the cases above cited each one involved an activity by the service station personnel wherein they were driving the car, either to get repairs accomplished at another place of business, to test-drive the car, or to deliver the car to or from the garage to the owner, and in all three it was held as a matter of law that those activities did not constitute evidence of a termination of the independent contractor relationship and an initiation of a principal-agent relationship. The present case is much easier than those cases inasmuch as the facts here clearly show that the purpose for the operation of the car by Christensen was to balance the wheels, which job he had undertaken to do but due to circumstances that day could not be accomplished at his station. Appellants are straining at a gnat when they argue that Christensen's operation of the car at the time of the accident was not a part of the repair

or maintenance process. If that were so, the courts would find themselves making tenuous delineations as to whether a particular act constitutes part of the repair process. For example, under appellants' thesis, would it be part of the repair process when the service station attendant got into the car to drive it onto the grease rack and would it be part of the service process when the station attendant pulled the car up to the gas pumps? It appears quite obvious that the only way Christensen could have completed the services that he contracted to perform would be to go to another station and there get the work completed. The undisputed facts also show that Dr. Stevenson had in no way restricted Christensen in how or in what manner he was to complete the repairs. Instead he was interested only in the end result (Christensen Dep. p. 45).

Appellants would have the court believe that the operation of the car by Christensen in driving to the Phillips Training Station to complete the wheel balancing was a mere accommodation for the respondent, and was thereby evidence of an agency relationship which should have been submitted to a jury. This contention is untenable. First of all, the undisputed facts arising from Christensen's Deposition show that the reason for the trip to the Phillips Training Station was to complete the repairs which he had promised to do for Dr. Stevenson, which he could not do as a result of his own defective equipment. When questioned as to why he decided to

complete the maintenance at another station, Christensen stated in his Deposition on pages 21-22:

"Q. And then you started to do this wheel balancing, and you say your machine was not functioning properly?

A. Yes, that's right.

Q. What was wrong with it if you know?

A. Well, it was one of the less expensive machines, and it was what they call a bubble balancer. It has a little float bubble in the top, and this bubble wouldn't center the way it should to balance the wheel. *And he was a good customer of mine; I wanted to do a good job on his car; that's when I decided I better take it some place else to have these wheels balanced. I didn't trust the machine.* (Emphasis ours)

Q. Did you talk with Dr. Stevenson about taking it outside of your station for this work?

A. No, I didn't."

Thus, by a clear and unequivocal statement, Christensen states the motivation for his operation of the respondent's car: To protect a regular and profitable business relationship between himself and the respondent. Christensen was looking after his own business interests. He was not about to inform Dr. Stevenson that he had better take his automobile to another place of business to have the wheel balancing done. Instead, Christensen saw a way to achieve the end which Dr. Stevenson had requested,

and at the same time retain his undivided patronage. The fact that he did not receive profit on that particular procedure is a myopic view of the business relationship between a service station and its steady customers, which relationship thrives upon uninterrupted good-will. Respondent agrees that the attempt by Christensen to get the wheels balanced was a benefit to Stevenson, just as was all of the other maintenance and repair work done by Christensen. However, Christensen was also benefiting in his role as an independent contractor from the repairs and maintenance and he stood to benefit materially from the balancing of the wheels inasmuch as he retained the goodwill and future patronage of a steady customer. Respondent is unable to see how the bailee-independent contractor relationship between Christensen and Stevenson was interrupted from the fact that Christensen's equipment was defective and unable to complete the repairs which he had contracted to do. Under the appellants' theory in this case each time a person employed an independent contractor to accomplish a certain end for him he would be running the chance of having that relationship turn into a principal-agent relationship if, while accomplishing that objective, the independent contractor, due to his own fault, is unable to fulfill his contract and thereby has to employ a subcontractor to finish it for him. This obviously is not the law.

The appellants cite the case of *Andrus v. Cox*, 23 S.W. (2d) 1066, Miss. (1930) for the proposition

that when an independent contractor performs an accommodation for a customer he thereby becomes an agent. First, let us point out that the *Andrus v. Cox* case involved a situation where the car was being delivered to the owner after the repairs had been completed, and the court thought the delivery was not part of the services which had been contracted. For that reason alone the *Andrus* case is not applicable to the present situation where the automobile was being driven for the purpose of accomplishing the contracted repairs and maintenance work. The *Andrus* case has also been widely criticized for its legal points and appears to present an extreme minority position in the United States.

In the case of *Nolan v. Nally,* 342 S.W. (2d) 400, Kentucky (1961) the owner had rented his car to two individuals who took it into a service station for repairs. An accident occurred when the service station attendant was returning the car to the owner after the repairs had been completed. In the trial of the action the court dismissed the two individuals who had rented the car, but denied the owner's Motion For Summary Judgment. On appeal the court of appeals held as a matter of law that the service station attendant was not an agent of the owner, and it was error thus not to dismiss him from the action. The court then took note of the *Andrus v. Cox* case and made the following critical evaluation:

> "It appears to us reasonable to say that picking up and delivering a motor vehicle by

a garageman is incidental to the job he will perform as an independent contractor, and the independent contractor relationship exists as long as he has exclusive control of the vehicle. *An attempt to change the legal effect of the relationship at any given point in the whole transaction by proof of some fact which has no bearing upon such control can lead to nothing but uncertainty and even absurdity.*" (Emphasis ours)

"In the present case the evidence presents issues as to whether the truck was to be delivered (1) as an accommodation, (2) as a part of a repair job, or (3) as a customary service. Not one of these questions has any bearing upon the exclusive control of the operation of the truck, which was clearly in the hands of the garageman." (Supra at 403)

In the present case there does not ever appear a legitimate question as to the purpose of Christensen's operation of the respondent's car.

In the case of *Reynolds v. Bounds*, 383 S.W. (2d) 496, Arkansas (1964) the owner had delivered the car to the service station and requested that he be driven out to his place of business. As the attendant was returning the car to the garage to service it the accident occurred. A jury verdict was returned against the owner of the vehicle. The appellate court reversed the trial court and held as a matter of law that there was no jury question as to whether an agency had been created between the owner and the service station attendant in respect to the trip back to the station. In doing so the court noted the various

cases supporting the general rule stated in 35 *A.L.R.* (2d) 804, wherein a service station attendant is deemed to be an independent contractor while he has exclusive control of the car for that purpose. The court also expressly rejected the *Andrus v. Cox* case and the suggestion there that agency was created when the car was delivered as an accommodation to the owner. The court, in holding that there was no jury question of agency, said:

> "The tone of all the testimony on this point convinces us that Davidson was simply accommodating a fairly new customer who had still other trucks and equipment that would require servicing. Davidson testified that he frequently delivered cars for his customers as an accommodation when asked, although he didn't advertise the fact and did not customarily go out of the city limits to pick up or deliver a car. Davidson further testified that in the instant case he wanted the business and was willing to accompany Smith and bring the truck back; and that he was going out there (past the city limits) and bring it back for the profit he could make off the wash, grease and oil change, and he didn't ask how far he had to go to get the job. It is undisputed that Smith gave Davidson no instructions relative to the return trip and that the purpose of the return trip was solely to accomplish the servicing job. (Supra, p. 499)

And in the previously cited case of *Councell v. Douglas*, supra, the court swept aside an argument by the plaintiff that the trip by the service station em-

ployee was taken for the benefit and convenience of the owner, by saying:

> "We fail to see any point to such argument unless it represents an attempt to persuade this court to revert to an expanded doctrine of the liability of the employer or principal contractor which it rejected in 1858. . . . Where an independent contractor is employed the employer of said contractor usually requests the contractor to render the service contracted for and almost always does so for his benefit or for his convenience or both."
>
> (Supra, p. 601).

And in reference to the delivery service provided, the court observed:

> ". . . Some of this evidence clearly indicates and it is always entirely consistent with the usual effort of a service station to attract a customer by making it convenient for him to contract with the service station for services required for his automobile." (Supra, p. 601)

There are numerous cases with similar holdings, a few of which are the following: *Frye v. Sinclair Oil and Gas Company*, 249 S.W. (2d) 102, Texas (1952), where a service station was employed to pick up trucks every weekend and service and wash them and return them to the owner's place of business. While on one of those trips the service station attendant was involved in an accident. The trial court held as a matter of law that there was no agency. This was affirmed on appeal, with the court basing its decision upon the fact that

there was no showing that the owner exercised any control over the work to be done by the service station and its employees. The court then also noted a statement in the case of *Gatz v. Smith*, 205 S.W. (2d) 616, where the court said:

> "The test is not whether the service was charged for. The test is whether the service was done under the orders or authority of the repairman. If it was, the acts of the employee, done in obedience to the orders of his employer, are the acts of the employer — not of his customer." (Supra, p. 618)

In the case of *Fry v. Robinson Printer, Inc.*, 155 So. (2d) 645, Florida (1963) the plaintiff was injured when the employee of the service station was driving the owner's car onto the grease rack. The court granted a Summary Judgment in favor of the owner, which was affirmed on appeal.

Ramsey v. Price, 161 So. (2d) 778, Mississippi (1964) was a case where the service station attendant had driven the owner to his place of business and was returning the car to the station for servicing when the accident occurred. The trial court held as a matter of law that the owner was not liable for the actions of the service station attendant, and on appeal this was affirmed. The court said:

> ". . . When the service establishment employee is in charge of the automobile driving it to or from the service establishment for servicing, he is not the agent of the owner but of his employer, the service establishment. Even if Mrs. Rogers instructed Price to re-

> turn the automobile to Torres' service station, such instruction does not make her liable for his negligence while so operating the automobile. The service station establishment as an independent contractor becomes a bailee of the automobile while it is being thus operated and serviced, and is responsible for the negligence of its employee. The great majority of the courts adhere to this rule. There is practically no authority to the contrary." (Supra, at 779)

In the case of *Kemelhar v. Kohn*, 159 N.E. (2d) 788, Ohio (1959) the owner took her car to a car wash and asked the attendant to drive her home and then bring the car back to wash it. When he hesitated in doing so, she told him she would be responsible for the car. While driving the car the attendant was involved in an accident. The trial court rendered judment in behalf of the plaintiff and against the owner. On appeal the court held as a matter of law that the evidence did not establish an agency relationship. In coming to that conclusion the court said:

> ". . . Any attempt to create a relationship between defendant and Norman (the station attendant) different from that of independent contractor must be established outside the bargain of agreeing to wash the defendant's car. . . ." (Supra, p. 789)

It is undisputed in the case at bar that there was no bargain or agreement between Christensen and Stevenson for the operation of Stevenson's automobile outside the repair and maintenance contract.

In the case of *Andrews v. Bloom*, 29 S.W. (2d) 284, Arkansas (1930) the owner had asked the garageman to come and pick up the car and service it. The accident occurred after the garage attendant had picked up the car and was driving to the service station. The evidence showed that this service was regularly performed for customers, although there was no extra charge made for it and no advertising was made of that service. The owner was held liable by the trial court. On appeal the supreme court of Arkansas reversed as a matter of law and dismissed the action against the owner. In doing so the court said in reference to the service of picking up the car:

> ". . . But this practice was a means whereby Ragdale's service was enlarged, and, in charging for work done upon the car, he received compensation for sending for it and delivering it. . . ." (Supra, p. 286)

In the case of *Siegrist Bakery Company v. Smith*, 36 S.W. (2d) 80, Tennessee (1931) the car had been driven to the garage for an inspection to find out what was wrong with it. The garage owner took the customer home and was bringing the car back for the inspection when the accident occurred. The evidence showed that the service was an accommodation by the garage to its customers. The court prefaced its holding by saying:

> ". . . In the case before us there is no conflict whatever in the evidence, nor do we think any state of facts is presented from which contradictory inferences might be drawn. We

> accordingly feel free to decide the case as a matter of law." (Supra, p. 82)

The court then reversed the trial court's judgment against the owner and dismissed the owner from the lawsuit. The court, in discharging the owner, stated that the only important question in that case was whether or not the bailment of the car by the owner to the garageman had been accomplished. The court said it made no difference where the rights of third parties are involved whether the bailment was for inspection or for repairs, and whether it is gratuitous or for a reward, and that even if the car had been delivered merely for inspection this was incident to Smith's repair work and in furtherance of that work.

And in a case similar in fact to the case at bar, *Oakley v. Thornberry*, 171 S.E. 426, West Virginia (1933) the owner made an arrangement with the service station operator to do repair work on the car and arranged for the service station operator to drive the owner's son to school, after which the service station operator was then to take charge of the car and drive it back to his station. As the service station operator was driving back to the station he realized that he had failed to procure parts which he would need for repairing the automobile so he slowed down and was negotiating a turn to go back to the city for the parts when he was involved in a collision. The owner was held liable in the trial of the action. The court set aside the judgment and

stated that the situation was no different than if the automobile had been left at the service station itself. The court concluded that the garageman became a bailee of the car when he took possession of it after the owner's son had left it with him. The court stated the proper rule was:

> ". . . But if under the contract the owner has specified the results only and the other party is left to his own election as to means and methods, the latter is an independent contractor and not an employee." Supra, at 427-428

It should be adequately clear from the cases above cited that an accommodation to a customer does not disrupt the independent contractor relationship, and especially is that true where the action of the service personnel is directly part of the repair or maintenance of the automobile. Thus the case at bar is much easier than the delivery and return cases above cited. The facts here not only show that the work was a benefit to Christensen, the independent contractor, but was also part of the repair process, thus obviating any question of fact as to the relationship between Christensen and Stevenson.

The appellants would also have us believe that there may be some inferences arising from the facts which should be submitted to a jury; however, if such inferences do exist they surely must be classified as remote and speculative and, therefore, of no moment to this appeal. A similar argument was

encountered in the case of *Butenshon v. Shoesmith*, 228 Pac. (2d) 426, Oregon (1951). In that case the owner took his car to a garage for paint and body work. He needed to be taken into town so an agent of the garage took him there and on the way back to the garage was involved in an accident. The facts show that such a service was for the convenience of the garage's customers. The court held as a matter of law that no agency relationship had been established and thus the owner was not liable to the plaintiff. The only factual issue was whether or not on the day of the accident the defendant had made the specific request to be taken into town or whether the service was something which he took for granted. The court said that the conflict was concerning an immaterial point and that the evidence was undisputed in showing that the garageman, acting through his agent, was bringing the owner's car from his place of business to their garage as a part of the service they undertook to render under a contract to repair the car. The plaintiff in that case argued that the question was properly submitted to the jury because of the inference of agency arising from the fact that the defendant was the owner of the automobile. The court rejected that contention, and in doing so referred to the case of *Kantola v. Lovell Auto Company*, 72 Pac. (2d) 61, Oregon (1937), wherein the court expressly rejected in a similar fact situation the argument that a jury question was presented by the inferences raised by the fact

that the defendant was the owner of the car which was being driven at the time of the accident. The court there concluded:

> "That where, as here, the uncontradicted evidence shows that the driver was not acting for or in the business of the owner, and it was also shown that the owner was not present and had no control over the operation of the automobile, the inference was rebutted and at an end, since there were no other grounds of liability claimed against the defendant, it was the duty of the court, when requested by the defendant, to direct a verdict in his favor." (Supra, p. 603)

And in this respect we note the case of *Saltas v. Affleck*, 99 Utah 65, 102 Pac. (2d) 493 (1940) wherein the court held that mere ownership of an automobile does not establish a prima-facie case of agency but rather there must be evidence of the agency relationship. And in the case previously referred to of *Morley v. Rodberg*, supra, the court there by inference indicated that there would be no presumption of agency where the owner was not present in the car.

CONCLUSION

It appears without question that the pre-trial court was correct in granting the respondent's Motion For Summary Judgment. The undisputed facts

established that at the time of the accident Christensen was operating the car as part of the repair process and that he was doing it in order to maintain a good business relationship with his steady customer by completing the job he had contracted to do. The applicable law shows the correct rule in these cases, namely, that there must be proof of an agency relationship in order to disrupt the independent contractor relationship which arises when the car is turned over to the service station operator, and such proof must show some degree of right to control by the owner over the operator of the car. The appellants in the present case concede that there was no right to control and that an independent contractor relationship did arise initially when Christensen took possession of the automobile. They, therefore, rely merely on the assertion that there is an inference of agency arising from the fact that this was an accommodation to Dr. Stevenson. However, the cited cases show the great majority of the jurisdictions reject the accommodation theory as a basis for finding agency. And even more obvious here is the fact that the trip was an essential step in Christensen's completion of the maintenance and repairs which he had undertaken as an independent contractor and, therefore, was not an accommodation to Dr. Stevenson.

Respondent respectfully submits that the pretrial court correctly granted his Motion For Summary Judgment.

Respectfully submitted,

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